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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - Petitioner

versus

HAROLD WHORTON - - - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR PETITIONER

ROBERT F. STEPHENS
Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

OPINION BELOW

The Opinion of the Supreme Court of Kentucky is reported as *Whorton* v. *Commonwealth*, Ky., 570 S. W. 2d 627 (1978). (The Opinion appears in the Appendix to the Petition for Writ of Certiorari at pp. 13-38.)

JURISDICTION

The Opinion of the Supreme Court of Kentucky in File No. 78-SC-92-MR was rendered on July 25, 1978. On October 10, 1978 that court denied Petitioner's timely Petition for Rehearing and Reconsideration and issued its Mandate in this case. (Appendix, hereinafter A., p. 6). The Petition for Writ of Certiorari was granted on January 8, 1979. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Supreme Court of Kentucky misinterpreted and misapplied to the instant case the prior decision of this Court in *Taylor* v. *Kentucky*, 436 U. S. 478 (1978)?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Harold Whorton, was convicted in the Jefferson Circuit Court, Criminal Division, Jefferson County, Kentucky, on ten counts of first degree robbery, two counts of first degree wanton endangerment and two counts of first degree attempted robbery, as proscribed by KRS 515.020 and 508.060. (Transcript of Evidence, hereinafter TE, 200-202). Judgment was entered in accordance with the jury's verdicts and Whorton was sentenced to consecutive terms of imprisonment aggregating 230 years of imprisonment. However, the Kentucky Supreme Court reversed the robbery and attempted robbery convictions because the

trial court refused to instruct the jury on presumption of innocence.[1]

The charges against Whorton grew out of three separate incidents. During the early morning hours of May 15, 1976, a black male entered a Krispy Kreme Donut Shop in or near Shively in Jefferson County, Kentucky carrying a pistol in one hand and a knife in the other. (TE, 86-90). After robbing the store and its employes, he cut the telephone lines, and left in a blue 1967 Oldsmobile. (TE, 87, 99). Four of those employes subsequently identified Harold Whorton as the robber. (TE, 89, 96, 100, 103).

On the evening of May 23, 1976, a black male, carrying a gun in one hand and a knife in the other, entered and robbed a Burger Chef restaurant located on Shelbyville Road in Jefferson County, Kentucky. (TE, 105-108). After cutting the telephone lines, he fled. (TE, 111). Two of the employes of that restaurant, who were present during the robbery, subsequently identified Harold Whorton as the robber. (TE, 107, 112).

On June 1, 1976, near midnight, a man entered a Jerry's restaurant on Brownsboro Road in Jefferson County, Kentucky and, after ordering some food, stuck a gun in the face of a waitress and announced that "this is a robbery." He then asked for the manager. (TE, 18). When the manager came to the front of the restaurant the robber fired a shot into the ceiling (TE, 54, 62) and then herded him, his employes and cus-

[1]The wanton endangerment convictions were reversed on appeal pursuant to a separate state ground. However, the sole basis for the reversal of Whorton's other state convictions in this case was the failure of the trial court to instruct the jury, upon request, on the presumption of innocence.

tomers together, taking money from their wallets, and forcing the manager to give him $700 from the safe. (TE, 43-47). After pulling the telephone out of the wall the robber then left this assembled group in a back room of the restaurant and made his escape. (TE, 44).

However, during the course of this robbery, one of the customers had managed to sneak away unnoticed and called the police from another restaurant located across the street. (TE, 69). Shortly thereafter, a police officer gave chase to an automobile departing the vicinity of the restaurant and pursued it until it struck a fire hydrant. (TE, 122-124). Harold Whorton emerged from that automobile and pointed a pistol at the officer who had given chase but dropped the weapon when commanded to do so. (TE, 124, 139). The stolen money and two pistols were found in the automobile, a 1967 blue Oldsmobile. (TE, 152, 131-137). Whorton and a companion were taken at once to Jerry's restaurant where ten of the persons present during the robbery identified Whorton as the robber. (TE, 20-21, 35, 36, 45, 54, 59, 63, 71, 78).

Whorton did not testify at his trial. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night of May 15, 1976, when the donut shop robbery occurred. During the trial Whorton requested an instruction on presumption of innocence but the trial court declined to so instruct the jury.[2]

[2]The requested instruction on the presumption of innocence reads as follows:

(Footnote continued on following page)

ARGUMENT

The Supreme Court of Kentucky Misinterpreted and Misapplied to the Instant Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. 478 (1978).

The Supreme Court of Kentucky has misinterpreted and misapplied a prior decision of this court, *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), to the instant case. That court has interpreted *Taylor* v. *Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S. W. 2d, at 633. This interpretation requires automatic reversal in every such case regardless of the circumstances of the case or the evidence adduced at trial. The petitioner respectfully submits that such an interpretation of *Taylor* v. *Kentucky* is incorrect.

In *Taylor* v. *Kentucky,* 436 U. S. 478 (1978), this Court held that *under the facts of that case* a Kentucky conviction had to be reversed when a presumption of innocence instruction tendered by the defense was refused by the trial court. On June 7, 1978, a week after the *Taylor* decision was rendered by this Court, the instant case came before the Supreme Court

(Footnote continued from preceding page)

"The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be ensidered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case," 570 S. W. 2d at 630. (A., p. 9).

of Kentucky for oral argument.[3] One of the issues in this case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. On July 25, 1978, the Supreme Court of Kentucky rendered its Opinion in the instant case[4] and, with respect to the issue on a presumption of innocence instruction, stated as follows:

> "In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor,* we must confess that we have a similar difficulty with the *Taylor* opinion itself.
>
> The dissenting members of our court feel that the holding in Taylor is confined to the facts of

[3]After the decision of this Court in *Taylor* v. *Kentucky,* but before the issuance of the opinion in the instant case by the Supreme Court of Kentucky, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed convictions* in two cases involving requested instructions on presumption of innocence wherein *Taylor* was distinguished on its facts. *Gully* v. *Commonwealth,* File No. CA-2048-MR and *Stewart* v. *Commonwealth,* File No. CA-1963-MR. These cases were not to be published and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor* in the Commonwealth of Kentucky. Both cases, on motions for discretionary review, were reversed by the Supreme Court of Kentucky in light of *Whorton* v. *Commonwealth, supra. Gully* v. *Commonwealth,* File No. 78-SC-542-D (January 16, 1979) and *Stewart* v. *Commonwealth,* File No. 78-SC-429-D (November 21, 1978).

[4]The Supreme Court of Kentucky also reversed on the same day as the *Whorton* decision the cases of *Williams* v. *Commonwealth,* File No. 78-SC-68-MR and *Avery* v. *Commonwealth,* File No. 78-SC-75-MR by Memorandum Opinions. Both cases are now pending before this Court on Petition for Writ of Certiorari filed by Petitioner.

> the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case** the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.' Admittedly, the weight of the evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.
>
> Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might

*Footnote 4 from the *Whorton* Opinion reads as follows: "4 On what other facts an appellate court might rest its decision we hesitate to guess."

have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial." 570 S. W. 2d, at 632-633.

The aforequoted holding in the opinion constituted an unexpected and surprise interpretation of *Taylor* v. *Kentucky* by the Supreme Court of Kentucky which the petitioner considers to be incorrect. Moreover, this misinterpretation of *Taylor* v. *Kentucky* poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the automatic reversal of numerous state criminal convictions. This is true even though the Supreme Court of Kentucky, apparently in response to the *Taylor* v. *Kentucky* decision, amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, which now requires the trial court to give a presumption of innocence instruction in every criminal case.[5] However, the petitioner

[5]That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him

(Footnote continued on following page)

has estimated that between 35 to 80 criminal cases tried prior to the rule change will be automatically reversed due to that court's interpretation of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth*.[6]

It is the position of the petitioner that *Taylor* v. *Kentucky* does not mean that a state criminal conviction in Kentucky must be automatically reversed merely because a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor* v. *Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases. In fact, it appears to the petitioner that under *Taylor* v. *Kentucky* the federal constitutional impact of such an instruction would depend wholly upon the facts and circumstances of each case and it would be only in those cases having exceptional circumstances, such as in *Taylor* v. *Kentucky*, that the absence of such instruction would result in a violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution.

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not guilty [and if you find him not guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree.]'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

[6]Such automatic reversal under *Whorton* has been applied to *Miller* v. *Kentucky*, No. 77-6912, wherein this Court granted an accused's Petition for Writ of Certiorari on October 2, 1978, and reversed and vacated the judgment of the Supreme Court of Kentucky, ordering that case to be reconsidered in light of *Taylor* v. *Kentucky*. The Supreme Court of Kentucky has subsequently reversed that case pursuant to its holding in the case at bar, *Miller* v. *Commonwealth*, File No. 78-SC-410-MR, rendered January 3, 1979).

Accordingly, the petitioner maintains that this Court's Opinion in *Taylor* v. *Kentucky* is limited solely to its facts. As previously noted, perusal of the Opinion clearly indicates that it was the unusual and unique "extraneous considerations" in that case which gave rise to the violation of Taylor's right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.[7] Thus, *Taylor* v. *Kentucky* does not create an across-the-board constitutional principle of sweeping applicability, but would apply only to those rare cases with factual situations involving such "extraneous considerations" as were found therein. Therefore, the Supreme Court of Kentucky was incorrect in interpreting *Taylor* v. *Kentucky* to apply to the case at bar merely because a requested instruction on presumption of innocence was rejected by the trial court, without analyzing the facts and circumstances of the two cases. The facts and circumstances of the instant case are clearly distinguishable from those in *Taylor*.

COMPARISON OF THE *WHORTON* AND *TAYLOR* CASES

The petitioner now directs this Court's attention to a comparison of the "facts and circumstances" in *Taylor* v. *Kentucky* and the case at bar:

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[7]*Taylor* v. *Kentucky*, 436 U. S., at 487, Footnote 15, ". . . the *cumulative effect of the potentially damaging circumstances* of this case violated the Due Process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence. . . ." (Emphasis ours.)

A.

Evidence

In *Taylor* v. *Kentucky* the evidence presented at trial consisted only of the conflicting testimony of the victim and the accused, in what was described by this Court as a "swearing contest". Here, on the other hand, the evidence adduced at trial established that Whorton had committed three different crimes within a seventeen day period that were very similar to one another in their *modus operandi*. Moreover, in each of the three crimes the prosecution presented numerous eyewitnesses who positively identified Whorton as the perpetrator. For example, *two eyewitnesses* identified Whorton as the robber in the Burger Chef restaurant robbery; *four eyewitnesses* positively identified Whorton in the Krispy Kreme Donut Shop robbery; and, *ten prosecution witnesses* identified Whorton as the robber of the Jerry's restaurant. Whorton was pursued by the police while attempting to make his get away from the last robbery and was apprehended only after he crashed his automobile into a fire hydrant. Weapons, the stolen money, and other incriminating evidence were found in his automobile. The only evidence presented by Whorton in his behalf was that of his wife and sister-in-law who testified that on the evening of the Krisy Kreme Donut Shop robbery, May 15, 1976, he was visiting his sister-in-law. Thus, the evidence in the instant case, unlike that in *Taylor* v. *Kentucky*, cannot be described as a mere "swearing match".

B.

Reading Indictment to Jury

As in *Taylor* v. *Kentucky,* the prosecutor read the three indictments to the jury. (Transcript of Record, hereinafter TR, 4-10). However, unlike *Taylor* v. *Kentucky,* after having read the indictments the prosecutor made no comments such as would permit the jury to draw inferences of guilt from the mere fact that Whorton had been indicted. Compare *Taylor* v. *Kentucky,* 436 U. S., at 487.

C.

Prosecutor's Summation

Another "extraneous consideration" (perhaps a critical one) which this Court duly noted in *Taylor* v. *Kentucky* were the numerous comments made by the prosecutor in his summation which this Court construed as asking the jury to draw inferences of the accused's conduct *from facts not in evidence.* The thrust of these comments, to a large degree, were construed as an invitation to the jury to consider Taylor's *status* as a defendant as evidence, in itself, tending to prove his guilt. On the other hand, in the instant case the summation of the prosecutor (TE, 186-199) contains no comments at all similar to those found in *Taylor* v. *Kentucky,* 436 U. S., at 487.

D.

Reasonable Doubt Instruction

In the case at bar the trial court gave an instruction to the jury defining reasonable doubt.[8] This instruction is very similar to that given by the trial court in *Taylor* v. *Kentucky,* 436 U. S., at 481, footnote 7. It is the position of the petitioner that the reasonable doubt instruction does not constitute an "extraneous consideration" adversely effecting the respondent in the case at bar, given all the facts and circumstances of this case. In general, the instructions in *Taylor* v. *Kentucky* have been described by this Court as *skeletal* and *Spartan.* Specifically, the reasonable doubt instruction in *Taylor* was characterized by this Court as "hardly a model of clarity", 436 U. S., at 488. However, the petitioner would respectfully point out that in *Miles* v. *United States,* 103 U. S. 304, 312 (1880), this Court observed that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[9] Also see

[8] "Instruction No. XVIII—If upon the whole case you have a reasonable doubt as to the defendant's guilt, you shall find him not guilty. The term reasonable doubt as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven but whether, after hearing all the evidence, you actually doubt that the defendant is guilty." (App., p. 30).

[9] Respondent's tendered instruction on reasonable doubt reads as follows:

> "A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any

(Footnote continued on following page)

Dunbar v. *United States,* 156 U. S. 185, 199 (1895) and *Holland* v. *United States,* 348 U. S. 121, 140 (1954). To our knowledge this Court has never held that there is a constitutional requirement that the term "reasonable doubt" be defined *at all,* much less, in a particular manner.[10] Thus, the petitioner respectfully submits that the reasonable doubt instruction given to the jury here does not constitute an "extraneous consideration" merely because of its brevity.

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fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. An accused is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise, not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, an accused has the right to rely upon failure of the prosecution to establish such proof. (An accused may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.) The law does not impose upon an accused the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jury members do not feel convinced to a moral certainty that an accused is guilty of the offense(s) charged." 570 S. W. 2d, at 629-630. (A., pp. 9-10).

[10]Some states, including Kentucky as of July 1, 1978, forbid defining the term "reasonable doubt" in order to avoid long elaborate confusing definitions which if anything, tend to mislead the jury. *State* v. *Van,* Mo., 543 S. W. 2d 827 (1976); *Miller* v. *State,* Okla. Cr., 567 P. 2d 105, 109 (1977); *State* v. *Starr,* W. Va., 216 S. E. 2d 242 (1975); *Blakeley* v. *State,* Wyo., 542 P. 2d 857 (1975); *Gray* v. *State,* Miss., 351 So. 2d 1342 (1977); *Foster* v. *State,* Ga., 242 So. 2d 600 (1978); *State* v. *Canedo,* Ariz., 563 P. 2d 315 (1977).

E.

Cumulative Effect

In discussing the necessity of a presumption of innocence instruction, this Court stated:

> ". . . that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. [Citations omitted]. And it long has been recognized that an instruction on the presumption is one way of impressing upon the jury the importance of that right. [Citations omitted]. While use of the particular phrase 'presumption of innocence'—or any other form of words— may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' [Citation omitted]. The 'purging' effect of an instruction on the presumption of innocence, *Thaxton,* supra at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial." 436 U. S., at 485-486.

Upon considering the numerous negative extraneous circumstances which occurred during Taylor's trial, this Court concluded that the *cumulative effect* of those potentially damaging circumstances violated the due process guarantee of fundamental fairness in

the absence of an instruction on presumption of innocence because there was a genuine danger that the jury would convict Taylor on the basis of these extraneous considerations. *Taylor* v. *Kentucky,* 436 U. S. 490, and 487 at footnote 15.

Significantly, Taylor maintained that, given the circumstances of his case, the purging effect of an instruction on the presumption of innocence was essential to a fair trial. This Court agreed. On the other hand, in the case *sub judice* there is no collection of negative extraneous circumstances necessitating the purging effect of an instruction on the presumption of innocence. Here, perusal of the record will unequivocally establish that the respondent's right to a fair trial was not jeopardized.

Alternatively, if the decision in *Taylor* v. *Kentucky* created a constitutionally mandated requirement that an instruction on presumption of innocence, when requested, must be granted, then the petitioner respectfully submits that, in light of the facts in this case, as distinguished from those in *Taylor* v. *Kentucky,* the Supreme Court of Kentucky should have applied the Harmless-Error rule to this case. *Harrington* v. *California,* 395 U. S. 250 (1969); *Chapman* v. *California,* 386 U. S. 18 (1967).

We are of course cognizant of the minority view in the *Chapman* case that any departure from constitutional procedures should result in automatic reversal regardless of the weight of the evidence. 386 U. S., at 42-45. However, in *Chapman* it was the majority view

of this Court that where the record indicates overwhelming evidence of guilt and where the alleged constitutional error does not so taint the trial in light of that record of evidence, the constitutional error must be considered harmless in nature. Such is the case at bar, assuming that the mere refusal to grant a requested instruction on presumption of innocence creates a violation of constitutional rights under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests this Honorable Court to reverse and remand this case to the Supreme Court of Kentucky because that court incorrectly interpreted *Taylor* v. *Kentucky,* 436 U. S. 478 (1978) to require automatic reversal of respondent's conviction on the basis of the trial court's refusal to instruct the jury, at respondent's request, on the presumption of innocence. The petitioner also requests that this Court hold that *Taylor* v. *Kentucky* is limited to its own facts and does not stand for the principle that the concept of presumption of innocence must be instructed upon when requested.

Alternatively, if *Taylor* v. *Kentucky* does establish a constitutional principle mandating that the jury be instructed upon the presumption of innocence the petitioner urges this Court to hold that the Supreme Court of Kentucky erred in not considering the application of the Harmless-Error Rule as enunciated in

Chapman v. *California,* 386 U. S. 18 (1967) and *Harrington* v. *California,* 395 U. S. 250 (1969), to this case.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General
Patrick B. Kimberlin, III
PATRICK B. KIMBERLIN, III
Assistant Attorney General
Capitol Building, Room 122
Frankfort, Kentucky 40601
Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, counsel for the petitioner, hereby certify that three (3) copies of the foregoing Brief for Petitioner were mailed, postage prepaid, this 16th day of February, 1979, to Hon. Terrence F. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin, III

PATRICK B. KIMBERLIN, III
Assistant Attorney General